No. 12,537

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
NIELS K. WIBYE,	*Appellee.*
UNITED STATES OF AMERICA,	*Appellant,*
vs.	
HAROLD WIBYE,	*Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

A rehearing of the above cases is respectfully requested for the following reasons:

I.

THERE IS NO EVIDENCE THAT DECEDENT HADLEY, AT THE TIME AND PLACE IN QUESTION HEREIN, WAS ACTING IN ANY DEGREE OR TO ANY EXTENT IN THE COURSE AND SCOPE OF HIS EMPLOYMENT BY APPELLANT, UNITED STATES.

This Honorable Court has held that recovery herein was justified because the decedent Hadley was, at the time of the accident, combining the business of his employer with that of his own; that, consequently, under the law of *Ryan v. Farrell,* 208 Cal. 200, decedent was then acting in the course and scope of his employment. We respectfully submit, however, and urgently request the opportunity to be further heard on the point, that actually there is no evidence whatever that at the time and place in question, the decedent was pursuing in any degree the business of his employer. Such a finding based on competent evidence is, of course, imperative to fix liability upon the appellant, United States, under the Federal Tort Claims Act.

All that the evidence here presented indicates is, that at the time of the accident, which occurred on Highway 50 between Stockton and San Francisco, decedent was intending to return to Seattle following the completion of his duties at Stockton, after first dining with his mother in San Francisco. It is submitted that this state of intent on decedent's part in no way indicates, directly or by inference, that decedent, while traveling from Stockton to San Francisco, was in any degree or respect acting in furtherance of

the business of his employer, the United States, that is, that his trip to San Francisco was part and parcel of his return trip to Seattle. Any such conclusion or inference from the known facts is negatived by the two following observations:

A. San Francisco is not a waypoint in any of the customary routes leading from Stockton to Seattle.

The following facts are within the judicial knowledge of this Court:

That on November 8, 1946 two main automobile highways were available to decedent in traveling northerly from Stockton to Seattle, namely: Highway 101, known as the Redwood Highway, and Highway 99, referred to in the opinion of this Honorable Court as the Inland Route; that traveling in a northerly and direct route from Stockton to Seattle, the Redwood Highway is not reached by going westerly to San Francisco, but by proceeding northerly to Cloverdale over a route passing through Rio Vista, Vallejo, Napa, St. Helena and Calistoga; that the Inland Route leads northerly from Stockton through Woodland, Redding, Weed, etc. Thus, neither route called for a trip to San Francisco. Consequently, decedent's only purpose in going to San Francisco must have been to visit his mother. If he intended to thereafter enter the Redwood Highway from San Francisco, he would be taking a more circuitous route to reach it from Stockton than was at all necessary, merely to further his own personal ends. While engaged in this detour, he was not on the business of his employer,

but in the pursuit solely of his own affairs and not until he reached the Redwood Highway can it be said he resumed the duties of his employment. A side trip by a government employee with a government car, for personal ends, it is submitted, is not a slight deviation from the business of the government. It is, in fact, a ground for suspension by virtue of the following provisions of 5 U.S.C., Section 78(c):

> "* * * any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft, or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant."

B. There is no evidence of what return route to Seattle the decedent intended to take after dining with his mother in San Francisco and, consequently, no evidence that decedent was proceeding to San Francisco in the pursuit of any business other than his own.

We have observed that if decedent intended to take the Redwood Highway to Seattle, he went out of his way for his own purposes in first proceeding westerly from Stockton to San Francisco. This, we submit, was a substantial deviation from his authorized itinerary, for his own account and contrary to positive law. Actually, however, there is no evidence that

decedent intended to return to Seattle via the Redwood Highway after dining with his mother. All the evidence there is which bears on the question of decedent's intent in proceeding to San Francisco from Stockton is found in the testimony of his mother, Mrs. Edna D. Fipps, as follows:

> "Q. In other words, that was all you know, that he said that he would get through up there in time so that he would come down in San Francisco and have dinner with you?
>
> A. Yes, on Friday, on his way home. He was on his way back to Seattle." (Tr. p. 157.)

The decedent may have intended to return to Seattle by proceeding inland again, through Vallejo, Dixon, Davis and Woodland, to pick up Highway 99 going northerly. This automobile route is a logical, customary and well traveled one from San Francisco to Seattle; and if it was decedent's intention to so return to Seattle by thus proceeding inland again to Highway 99 after visiting his mother in San Francisco, then obviously his trip to San Francisco was a complete deviation from his intended itinerary, for his own and for no other purpose. For otherwise, he could have proceeded northerly on Highway 99 directly from Stockton. We are thus compelled to conclude that there is no evidence to warrant the finding that decedent went to San Francisco on any business other than that of his own.

II.

IN A SUIT AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT, FOR PERSONAL INJURIES DUE TO THE NEGLIGENT OPERATION OF A MOTOR VEHICLE ON THE PART OF A GOVERNMENT EMPLOYEE, THE BURDEN OF PROVING THAT THE NEGLIGENT ACT WAS COMMITTED IN THE COURSE AND SCOPE OF THE EMPLOYEE'S DUTIES FOR THE UNITED STATES IS UPON THE PLAINTIFF, AND NO PRESUMPTION TO THAT EFFECT ARISES FROM THE FACT THAT THE EMPLOYEE WAS A GOVERNMENT EMPLOYEE OPERATING A GOVERNMENT-OWNED VEHICLE. FURTHERMORE, SUCH A PRESUMPTION, IF AT ALL APPLICABLE, MUST FAIL IN THE FACE OF PROOF THAT THE EMPLOYEE WAS USING THE VEHICLE FOR HIS PERSONAL AFFAIRS.

We submit that the case of *Hubsch v. United States,* 174 F. (2d) 7, correctly states the law with respect to the inapplicability, in suits against the United States under the Federal Tort Claims Act, of local law which creates a presumption of liability against an employer for the negligent acts of his employee, solely by virtue of the fact that the employee was at the time operating a motor vehicle belonging to the employer.

The United States has consented to be sued for the torts of its agents only when those torts are committed in the course and scope of their employment by the United States. Before any liability attaches against the United States for the tortious acts of its agents, it is a jurisdictional prerequisite that the Court find from the preponderance of the evidence before it, and not by resort to presumptions created by local law, that such acts were committed in and about the per-

formance of governmental duties. And if, as here, the proof establishes that the employee was using the vehicle to further his own purposes, certainly such presumption, even if otherwise applicable, must fall in the face of positive evidence to the contrary.

CONCLUSION.

For the reasons herein given, appellant respectfully submits that the law of the case, under the facts in evidence, is not as stated in *Ryan v. Farrell,* 208 Cal. 200, but is the law as the same is enunciated in the several cases set forth in appellant's opening brief, pages 6-17, and in appellant's reply brief, page 6. Furthermore, we are not here confronted with the question of whether in making the trip to San Francisco, there was a slight deviation from the course of decedent's employment as compared to a substantial deviation. Nor does this case present a situation in which the evidence warrants a finding that personal and business affairs were intermingled by decedent's trip to San Francisco. The case here shown is one in which all that appears from the evidence is that decedent, at the time of the accident, was on his way to dine with his mother before starting back to Seattle and after having concluded his duties at Stockton. There is, however, no evidence whatsoever that decedent, at the selfsame time and in the course and scope of his employment, was engaged in using the

highway between Stockton and San Francisco as a connecting link of his return route to Seattle.

Dated, San Francisco, California,
August 30, 1951.

Respectfully submitted,

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RUDOLPH J. SCHOLZ,
Assistant United States Attorney,

ANTOINETTE E. MORGAN,
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Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and that it is not interposed for delay.

Dated, San Francisco, California,
August 30, 1951.

ANTOINETTE E. MORGAN,
Assistant United States Attorney.